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95-2002

NO. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

Jodie Timothy Packer, Petitioner

v.

United States of America

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI

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Pro-Se

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The Petitioner would respectfully request that the following points of fact and of law be included in and considered with the following Questions Presented for Review set forth in petitioner's original petition.

I. Adherence to Dispositive Supreme Court and Circuit Precedent Is Mandatory

Petitioner would ask the Court to consider the Solicitor General's Brief for the United States in ***Chaplin v. United States***, Sup. Ct. docket # 95-1355, October Term 1995, brief dated May 1996. The Solicitor General adopts the same position ***Packer*** has asserted in his Petition, that dispositive circuit precedent is binding on subsequent panels of the same circuit.

The Solicitor General states "Under the doctrine of stare decisis, an appellate panel is generally bound by the holding of a prior panel, absent an intervening contrary decision by the en banc court, [or] the Supreme Court ..." and "[T]he doctrine of stare decisis precludes reconsideration of legal issues and applies to all persons ..." Concluding, "The court of appeals correctly applied the doctrine of stare decisis in this case." Citing several Fifth Circuit cases cited in ***Packer's*** original petition as authority.

Although the Solicitor General states that the doctrine of stare decisis was correctly applied in Chaplin's case, the Fifth Circuit applies the binding precedent rule which, unlike the doctrine of stare decisis, affords a court no discretion to depart from one of its own prior holding. See ***Johnson v. DeSoto County Bd of Com'rs***, 72 F.3d 1556, 1559 n.2 (11th Cir. 1996).

Additionally, under Fifth Circuit case law, should the same legal issue be before the Circuit for review again, the Court must follow the precedent of ***Mitchell***, as cited in ***Packer's*** petition, as the Court was without the self-professed authority to overrule ***Mitchell*** in the ***Packer*** decision. See ***U.S. v. Miro***, 29 F.3d 194, 199 n.4 (5th Cir. 1994) (The first of conflicting panel decisions is to be followed as the second decision is invalid because the second panel was without the authority to overrule the first panel.).

Petitioner would respectfully submit that in light of the Solicitor General's response in ***Chaplin***, the Solicitor General has constructively adopted the same position ***Packer*** asserted in his original petition and would ask this Honorable Court to consider its holding in ***Lawrence v. Chater***, 133 L.Ed.2d 545 (1996) and ***Stutson v. United States***, 133 L.Ed.2d 571 (1996) concerning GVR'ing in light of "confessions of error or other positions newly taken by the Solicitor General".

"A rule of the court thus authorized and made has the force of law, and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case[.]" ***Rio Grande Irrigation and Colonization Co. v. Gildersleeve***, 174 U.S. 603, 608-09 (1899); ***Weil v. Neary***, 278 U.S..160, 169 (1929)

A defendant before the court "has a right to rely upon local rules, as the parties and the court are bound by them". ***Woods Construction Co. v. Atlas Chemical Industries, Inc.***, 337 F.2d 888, 890 (10th Cir. 1964).

Where a court's violation of its rules affects substantial rights, reversal is required. ***Martel v. County of Los Angeles***, 34 F.3d 731, 737 (9th Cir. 1994).

Fifth Circuit Rule 47.5.3 made pursuant to the authority of 28 U.S.C. Section 2071 and Rule 47, Federal Rules of Appellate Procedure; Fifth circuit case law as cited in the body of ***Packer's*** Petition for Writ of Certiorari; and the Supreme Court precedent of ***Weil v. Neary***, supra, make a subsequent panel's adherence to a prior panel's precedential decision mandatory. The district court's and the Fifth Circuit's violation of their own rule affected the substantial rights of ***Packer*** due to his being sentenced to at least sixteen (16) months more than he would have been had the courts adhered to their own rule.

"It is well established that when an agency establishes rules to govern its proceedings, these rules must be scrupulously observed." ***George Kabeller, Inc. v. Busey***, 999 F.2d 1417, 1420 (11th Cir. 1993).

"It is equally well established that it is a denial of due process for any government agency to fail to follow its own regulations providing for procedural safeguards to persons involved in adjudicative processes before it." ***Government of Canal Zone v. Brooks***, 427 F.2d 346, 347 (5th Cir. 1970); citing ***Vitarelli v. Seaton***, 359 U.S. 535 (1959); ***Service v. Dulles***, 354 U.S. 363 (1957); ***United States ex rel. Accardi v. Shaughnessy***, 347 U.S. 260 (1954).

The federal courts are akin to government agencies in the context of making court rules "providing for procedural safeguards to persons in adjudicative

processes before it". The Court's failure to adhere to rules providing for procedural safeguards is a denial of due process of the persons involved in adjudicative processes before it.

III. A Constitutionally Required Voluntary Plea of Guilty is a Required Predicate to an Enforceable Appeal Waiver

On direct appeal one of the issues of ineffective assistance of counsel ***Packer*** raised was that his trial counsel was constitutionally ineffective because he did not know the law of structuring financial transactions, 31 U.S.C. Section 5324, as established by the Supreme Court in ***Ratzlaf v. United States***, 501 U.S. _____ (1994), in relation to the facts of ***Packer's*** case and that he allowed ***Packer*** to plead guilty to an offense for which ***Packer*** was not factually guilty. The Supreme Court in ***Boykin v. Alabama***, 395 U.S. 238 (1969), established that the guilty plea record must "disclose that the defendant voluntarily and understandingly entered his Plea[] of guilty". It was clear from the record of ***Packer's*** plea that neither his attorney, nor the court or the government were aware of the additional element of the offense of structuring established by this Court seven (7) months earlier in ***Ratzlaf***. ***Packer*** did not "receive[] real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process". ***Henderson v. Morgan***, 426 U.S. 637, 645 (1976).

Packer waived his right to appeal any finding of guilt in his plea agreement; but, in doing so he did not realize that his conduct did not constitute a crime. ***Packer*** stated on appeal that had he of known that his conduct did not constitute a crime, he would not have

pled guilty. ***Packer's*** attorney allowed him to plead guilty to a crime for which his conduct did not constitute a crime and then allowed him to waive his right to appeal any finding of guilt. The Fifth Circuit, on review, stated that once an accused has knowingly waived his right to appeal, he has waived the right for the court of appeals to determine if the guilty plea was taken in violation of due process.

The Courts have held that a plea agreement could not waive a claim of ineffective assistance of counsel. See ***U.S. v. Henderson***, 72 F.3d 463, 465 (5th Cir. 1995) ("[W]e have previously noted ... that waivers of rights to appeal may not apply to ineffective assistance of counsel claims."). ***U.S. v. Pruitt***, 32 F.3d 431, 433 (9th Cir. 1994) ("We doubt that a plea agreement could waive a claim of ineffective assistance of counsel based on counsel's erroneously unprofessional inducement of the defendant to plead guilty or accept a particular plea bargain.").

CONCLUSION

FOR THESE REASONS, Petitioner prays this Honorable Court will issue a Writ of Certiorari and review the opinion below.

Respectfully submitted,

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